

OCT 13 1990

JOSEPH F. SPANIOL, JR.
CLERK5
No. 90-443

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

KERN RIVER GAS TRANSMISSION COMPANY,
Petitioner,

v.

THE COASTAL CORPORATION,
COLORADO INTERSTATE CORPORATION,
COLORADO INTERSTATE GAS COMPANY,
COASTAL WESTERN PIPELINE COMPANY,
COLORADO INTERSTATE GAS WESTERN
PIPELINE COMPANY, and
WYOMING-CALIFORNIA PIPELINE COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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I. RESPONDENTS DISTRACT THE COURT WITH ISSUES RESOLVED AGAINST THEM IN THE PROCEEDINGS BELOW.

Respondents' Brief is replete with distracting references to issues that were resolved adversely to Wy-Cal¹ by the District Court. *E.g.*, Response Brief ("Res. Br.") at 6-7. While Respondents may "continue to believe" that they are entitled to prevail on each of these grounds, the District Court correctly held that:

- (1) The District Court's jurisdiction to award relief for copyright infringement² could not be abrogated by the FERC for the mere sake of administrative convenience.
- (2) Petitioner, as a partnership, is the proper owner of the copyrights in works contributed by its constituent partners.
- (3) Petitioner's maps are not precluded from copyright protection merely because they are based in part on earlier works.
- (4) Petitioner's limited distribution of maps to landowners and other interested parties on a need-to-know basis, without formal copyright notice, was a "limited publication" for which no "cure" was required.

¹ Wyoming-California Pipeline Company ("Wy-Cal") was the principal representative of Respondents in the events involved in this controversy.

² Respondents state that "Kern River sought to impound the certificate issued to Wy-Cal by the FERC..." Respondents' Brief at 6. In reality, the primary relief sought by Kern River was the impoundment of the infringing maps and an injunction against Wy-Cal's use of those maps. *See* Kern River's Post-Hearing Brief dated June 15, 1989 at 5.

II. RESPONDENTS MISSTATE THE RECORD

A. Respondents Copied Petitioner's Maps.

The District Court correctly found that Respondents copied Petitioner's copyrighted maps. Respondents attempt to obscure this fact, stating euphemistically that "Wy-Cal's draftsmen plotted on blank pages the center-line of the corridor as reflected by the maps provided by the Chambers Group." Res. Br. at 3. Translated, this means: they copied the maps. Respondents then state elliptically that "Wy-Cal used maps which were generated without referring to any maps later registered by Kern River." *Id.* at 4. Respondents fail to add that they subsequently copied Petitioner's copyrighted maps and, by their own admission, "distributed" these maps "to the FERC, the CSLC, Chambers and other interested persons,"³ all in support of their application to construct a pipeline in competition with Petitioner's application.

B. Respondents' Draftsmen Knew Exactly Where The Copied Maps Came From.

Respondents would portray Wy-Cal as an "innocent" victim led down a primrose path by the contractor who provided Wy-Cal with access to Kern River's maps. However, Respondents falsely represent that "The Chambers Group arranged with Wy-Cal for Wy-Cal representatives to visit The Chambers Group office in Albuquerque in order to plot accurately the centerline of the FEIS [Final Environmental Impact Statement] corridor." Res. Br. at 2-3. In reality it was Wy-Cal, not The Chambers Group, that initiated this meeting and that was responsible for the necessary "arrangements."⁴ Moreover, Respondents did not merely copy the center line of the approved corridor; in addition, they copied *all* of Petitioner's approximately 140 maps representing the entire length of Petitioner's route,

³ Record (hereinafter "R.") Vol. 4, Docket No. 57, at 7.

⁴ Testimony of Floyd Robertson, R. Vol. 11, Tr. at 329-330.

including portions of Petitioner's route *outside* the common stretches of the parties respective routes at that time.⁵

Respondents further state that "[t]he Wy-Cal draftsmen were unaware of where the maps came from..." Res. Br. at 3. However, Wy-Cal's draftsmen knew exactly where the maps came from, for the maps bore a stamp identifying them as Kern River's work product.⁶

C. Respondents Were Well Aware Of Petitioner's Claim Of Property Rights In The Disputed Maps.

Respondents state that "Wy-Cal never had knowledge of a claimed copyright on the maps prior to the filing of this suit," Res. Br. at 3, and that Kern River "never advised anyone of its alleged copyrights until after the FERC indicated it was granting a certificate to Wy-Cal three or four years later." *Id.* at 4. In reality, Wy-Cal was keenly aware of Kern River's proprietary interest in the subject maps prior to copying them. In prior proceedings before the FERC, Kern River had consistently sought to enforce its rights by seeking administrative remedies to prevent

⁵ Testimony of Jeffrey Kinnan, R. Vol. 15, Tr. at 45-46.

⁶ One of Respondents' draftsman who copied Petitioner's maps testified in his deposition:

Q. [D]o you recall [the maps] having a Kern River stamp on them, a revision stamp on some of the quad maps, the copies that you looked at?

A. Yes, I do.

Q. Did you believe those maps to be Kern River's maps at the time you were looking at them?

A. Yes.

Testimony of Larry Gene Dickinson, admitted as attachment to Plaintiff's Summary of Deposition Transcripts at p. 8, entered May 4, 1989, R. Vol. 3, Docket No. 80.

Wy-Cal from misappropriating the fruits of Kern River's labor in Wy-Cal's FERC application.⁷ In any event, no notice of copyright was required, because there was no general publication of Petitioner's maps. See *Intown Enterprises, Inc. v. Barnes*, 721 F.Supp. 1263, 1266 (N.D.Ga. 1989) ("innocent infringer" defense unavailable for unpublished works despite absence of notice).

D. Respondents Misstate Their Purpose In Copying Kern River's Maps And The Advantages They Achieved From Such Copying.

Respondents mislead the Court in stating that "Wy-Cal wished to be within the corridor, but was not interested in tracking precisely the Kern River route." Res. Br. at 3. In reality, Respondents' route ultimately *did* "track precisely" Kern River's route.

Respondents further distort the record by suggesting that they achieved no significant benefit from their copying of Kern River's maps and that their use of the copied maps was merely superfluous to the administrative process. Wy-Cal's submission of infringing maps was the outgrowth of a data request *from the FERC*. Moreover, Respondents' copying provided them with a windfall *independently* of the administrative process: it allowed them to avoid the expenditure of time, effort and money necessary to derive their own detailed route within the EIS corridor, which was needed in order to proceed with right-of-way activities and other construction-related efforts.⁸

⁷ E.g., *Wyoming-California Pipeline Co.*, FERC Docket Nos. CP87-479-000 and CP87-480-000, Motion of Kern River Gas Transmission Co. to Intervene, Protest, Motion to Consolidate, Motion to Dismiss and Contingent Motion to Defer Consideration (September 10, 1987), at pp.7-11.

⁸ Testimony of Robert Sluder, R. Vol. 8, Tr. at 47; Testimony of Cuba Wadlington, R. Vol. 12, Tr. at 391, 396-97; Testimony of Floyd Robertson, R. Vol. 14, Tr. at 628, 650.

Respondents are also incorrect in stating that "[t]here was no evidence presented that Wy-Cal's application with the FERC in any way delayed or hindered a ruling on Kern River's application..." Res. Br. at 5. In fact, Kern River's application was delayed because of Wy-Cal's application. In March and August 1988, the FERC issued orders requiring the administrative law judge to delay an initial decision on Kern River's application in favor of proceeding rapidly with consideration of the environmental aspects of Wy-Cal's application.⁹ If Wy-Cal had failed to demonstrate that its proposed route lay within the EIS corridor, the Commission would not have been in a position to expedite the review of Wy-Cal's application at the expense of Petitioner's application.

Respondents conclude that "the copies of the maps resulting from the April 4, 1988 Albuquerque incident [*i.e.*, the copied maps] were not required for Wy-Cal to obtain a FERC certificate." Res. Br. at 4. Petitioner agrees that Respondents could have created their own maps based on the information otherwise available to them. However, this fact contradicts the finding of the Court of Appeals that "[t]o extend copyright protection to the quad maps would grant Kern River a monopoly over the only approved pipeline route." 899 F.2d at 1465; App. 12a.¹⁰ If copying Petitioner's maps was not necessary to Respondents, then extending copyright protection to Petitioner's maps could hardly grant a monopoly to Kern River over the proposed route.

⁹ *Mojave Pipeline Co.*, 42 FERC (CCH) ¶ 61,351 (1988); *Mojave Pipeline Co.*, 44 FERC (CCH) ¶ 61,210 (1988).

¹⁰ Respondents imply that the Court of Appeals' reference to a monopoly was limited to "one sentence." Res. Br. at 12. In fact, the Court of Appeals cited the perceived threat of a "monopoly" in four separate portions of its opinion, *see* 899 F.2d at 1464, 1465, making it clear that this constituted the principal basis for its decision.

E. The District Court Found That There Was A Meaningful Distinction Between Kern River's 1:250,000 Scale Maps And Its 1:24,000 Maps.

Finally, Respondents misstate the record by claiming that Kern River has invented a spurious distinction between its 1:250,000 maps and its 1:24,000 maps (the "quad" maps), thus "abandoning" its copyright claim in the former. *See* Res. Br. at 3. In fact, it was the District Court, not Petitioner, that found this distinction to be crucial. App. 19a - 20a.

Respondents attempt to obscure this distinction, stating: "Nor could the proposed Kern River route as depicted on its quad maps possibly depict the *exact* location of a 36-inch pipeline which might ultimately be built as Kern River argues."¹¹ However, the fact remains that any number of proposed routes could be located *within* the mile-wide corridor, regardless of whether they were 36 inches wide or 100 feet wide.

III. ARGUMENT

A. Lines On A Map Depicting A Proposed Pipeline Are Subject To Copyright Protection If They Exhibit A Requisite Degree of Originality.

The Copyright Clause of the U.S. Constitution grants Congress the power to protect the "Writings" of "Authors."¹² The definition of "writings" is intended to be read expansively.

¹¹ Respondents state, "The very width of the line would measure some 100 feet on the ground, given the scale of the maps on which they were drawn." Res. Br. at 3-4. However, 100 feet is approximately the width of the right-of-way needed to construct the pipeline, and the work space needed to install and maintain the pipe is an essential element of the pipeline route. Therefore, a line representing 100 feet on the ground is an accurate description of where the pipeline will be installed.

¹² U.S. Const., Art. I, § 8, Cl. 8.

International News Service v. Associated Press, 248 U.S. 215, 234 (1918).¹³

Respondents argue that "a mere line depicting a proposed pipeline route on preexisting USGS maps in the public domain cannot be copyrighted." Res. Br. at 8. However, in one of the seminal cartography cases it was held that the mapmaker's contribution of a mere line representing part of a road was subject to copyright protection; the court there concluded that:

The defendant itself had a right to take from the same sources that the complainant sought. It had a right itself to make a map which would be identical with the complainant's map and not infringe the copyright, but it did not see fit to do that. Instead of expending its own time and labor for that purpose and making a map which would be identical with complainant's map, and thus protecting itself, it made an exact copy of the complainant's map, and thereby saved itself the expenditure of time and labor which the complainant was compelled to expend himself in order to make his map.

Woodman v. Lydiard-Peterson Co., 192 F. at 70.

Respondents claim that "Kern River's proposed pipeline route is a paradigm example of the merger of idea and expression" because a line "is the only way of expressing the ideas" embodied in the route. Res. Br. at 10.¹⁴ On the

¹³ These terms have been construed not in their "narrow literal sense, but, rather, with the reach necessary to reflect the broad scope of constitutional principles." *Goldstein v. California*, 412 U.S. 546, 561 (1973). The word "writings...may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor." *Id.* (emphasis added).

¹⁴ Again Respondents distort the record, for methods of expressing a pipeline route *other* than as a line on a map are frequently used in the industry, e.g. alignment sheets and photogrammetric surveys. Testimony

contrary, no court has ever held an original work of cartography to be precluded from copyright protection on such basis, although there are numerous cases holding similar maps subject to protection.¹⁵

The fallacy of Respondents' argument is apparent in their assertion that copyright protection for cartographic works should extend only to "colors, form of printing, [and] symbols..." and not to the depicted location of a "highway or political boundary." Res. Br. at 11. This view, and the Court of Appeals' holding supporting it, signifies a radical departure from the existing scope of protection for maps and other "fact works."¹⁶ It would apply to preclude copyright protection for a line depicting a river, a road, or any other geographical feature. If an independent cartographer created a map of Petitioner's proposed pipeline based on his own observations and surveys, his work would similarly be denied copyright protection. This astonishing proposition accounts for the concerns registered in this case by representatives

of Robert Sluder, R. Vol. 8, Tr. at 49 and R. Vol. 15, Tr. at 153; Testimony of Floyd Robertson, R. Vol. 14, Tr. at 636.

¹⁵ E.g., *Blunt v. Patten*, F. Cas. No. 1580 (C.C.N.Y. 1828); *Gray v. Russell*, 10 F. Cas. 1035 (No. 5728) (C.C.D.Mass. 1839); *Emerson v. Davies* 8 F. Cas. 615 (No. 4436)(C.C.D.Mass. 1845); *Farmer v. Calvert Lithographing Co.*, 8 F. Cas. 1022 (No. 4651)(C.C.E.D. Mich. 1872); *Woodman v. Lydiard-Peterson Co.*, 192 F. 67 (C.C.D.Minn. 1912), *aff'd*, 204 F. 921 (8th Cir. 1913), *reh. den.* 205 F. 900 (1913); *General Drafting Co. v. Andrews*, 37 F.2d 54 (2d Cir. 1930); *Crocker v. General Drafting Co.*, 50 F.Supp. 634 (S.D.N.Y. 1943); *County of Ventura v. Blackburn*, 362 F.2d 515 (9th Cir. 1966); *Newton v. Voris*, 364 F.Supp. 562 (D.Ore. 1973); *United States v. Hamilton*, 583 F.2d 448 (9th Cir. 1978); *Rockford Map Publishers, Inc. v. Directory Service Co.*, 768 F.2d 145 (7th Cir.), *cert. denied*, 474 U.S. 1061 (1986); *Del Madera Properties v. Rhodes & Gardner, Inc.*, 820 F.2d 973 (9th Cir. 1987).

¹⁶ See generally Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 Harv. L. Rev. 1569 (1963).

of the cartography industry who have moved the Court to appear as *amicus curiae*.

The issue is not whether the line on a map is the only way of expressing a geographical location, for a third party is free to create an identical map as long as he does not *copy* that of the plaintiff. Nor is the issue whether the line is drawn on a preexisting USGS map.¹⁷ The issue is whether the line represents an *original contribution*. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57-61 (1884). The Court of Appeals below held that Petitioner's maps "clearly...met the originality requirement." 899 F.2d at 1464, App. 11a. The inquiry should have ended there.

In summary, no one owns the location of a proposed route depicted on a map, and third parties are free to create identical maps of the route through their independent efforts. However, third parties are not free to copy and commercially exploit the original cartographic works of another; such copying, in the words of Justice Story, is nothing but "downright piracy." *Emerson v. Davies*, 8 Fed. Cas. 615, 619 (No. 4436) (C.C.D. Mass. 1845).

B. Respondents' Other Arguments Fail to Negate The Importance Of This Case To The Cartographic Industry.

Respondents' remaining arguments relate to the Fifth Circuit's refusal to join the other Circuits in recognizing a presumption of harm in determining the availability of preliminary relief,¹⁸ and its refusal to consider whether Respondents' copying

¹⁷ In fact, contributions of cartographers to preexisting USGS maps have been specifically held subject to copyright protection. *See General Drafting Co. v. Andrews*, 37 F.2d 54, 55 (2d Cir. 1930).

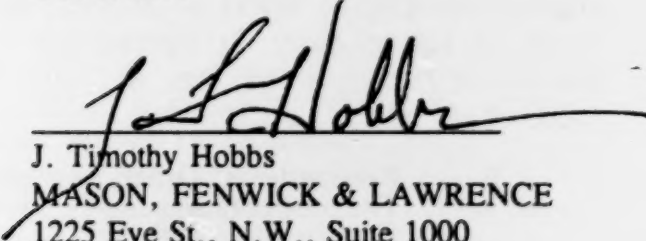
¹⁸ Respondents argue that the evidence in this case "rebutted" a presumption of irreparable harm. Again, Respondents misstate the record in claiming that Kern River suffered no damages whatsoever; the District

constituted "fair use" under 17 U.S.C. § 107. Respondents urge this Court to abstain from reviewing these issues because the Court of Appeals itself refused to do so, hardly a convincing proposition given the severity of the error committed by the Court of Appeals in its quest to avoid the issues presented to it. While those issues warrant review by this Court in their own right, the superseding reality of this case is that a Writ of Certiorari is vitally necessary to address the issue which the Court of Appeals *did* decide.

CONCLUSION

For all the reasons discussed above, Respondents' Brief is lacking in merit, and this Court should grant the requested Writ of Certiorari.

Respectfully submitted,
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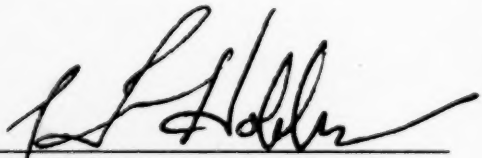
Court found that "Kern River may have suffered damages and may prevail at the time of trial on the merits." App. 21a.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 18, 1990, copies of the foregoing REPLY BRIEF IN OPPOSITION were sent by first class mail, postage prepaid, to the following counsel of record:

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